No. 14418

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VASILIKI ANDRE GIANNOULIAS,

Appellant,

vs.

HERMAN R. LANDON, as District Director, Immigration and Naturalization Service, Los Angeles District,

Appellee.

APPELLANT'S BRIEF.

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Jurisdictional Facts.

This case is brought before the Court on appeal from a judgment of the United States District Court in and for the Southern District of California, Central Division, filed June 14, 1954, denying a petition for writ of habeas corpus in a deportation matter and discharging an order to show cause [Tr. 39, 40].

The District Court had jurisdiction under Title 28, U. S. C. A. 2241 *et seq.,* and this Court has jurisdiction to review the judgment pursuant to Title 28, U. S. C. A. 1291.

There is involved in this case the validity of the second paragraph to Section 3 of the Act of May 14, 1937 (50 Stat. 165, 8 U. S. C. A. 213a) which reads as follows:

> "When it appears that the immigrant fails or refuses to fulfill his promises for a marital agreement made to procure his entry as an immigrant he then becomes immediately subject to deportation."

Statement of the Case.

The appellant is a native and citizen of Greece, born on July 16, 1912. She lived in Greece until March, 1950, at which time she embarked for Nassau, Bahamas, for the purpose of contracting marriage with John Fitsos, a resident and citizen of the United States. Prior to this embarkation, a courtship by correspondence of several months duration had occurred, the parties had exchanged photographs, and they had reached an agreement to marry.

The prospective husband, John Fitsos, a man of approximately 55 years in 1950, made arrangements to bring the appellant from Greece to Nassau, Bahamas. She arrived there on March 21, 1950 [Tr. 115]. Fitsos reached Nassau from the United States a few days later, approximately March 24, 1950 [Tr. 226], and the civil marriage ceremony was performed at Nassau on March 27, 1950 [Tr. 242]. Consummation of the marriage was postponed by agreement of the parties until a religious ceremony could be performed in the Greek Orthodox Church, Los Angeles, California, where the relatives of the bride and groom resided. Fitsos then filed a petition with the American authorities seeking recognition of the appellant as his wife, as well as her classification as a non-quota immigrant under the provisions of Section 4(a) of the Immigration Act of 1924 (8 U. S. C. A. 204(a)). This petition was approved on April 5, 1950 [Tr. 230], and the visa was issued to appellant by the American Consulate at Nassau, Bahamas on April 11, 1950 [Tr. 202]. Appellant and her husband proceeded to the United States together from Nassau, Bahamas, and she was admitted as a permanent resident at Miami, Florida, on April 13, 1950 [Tr. 202].

Fitsos separated from appellant within a few hours after the arrival and proceeded to Malone, New York for the alleged purpose of bidding farewell to his brother-in-law, Mr. George Smerlis, who was embarking on a trip to Greece. Fitsos agreed to meet appellant later in Los Angeles, California, and she proceeded alone to Los Angeles and was received into the home of her brother, Theodore Giannoulias, also known as Ted Giannos. Fitsos reached Los Angeles on or about April 26, 1950 [Tr. 212].

The contemplated religious ceremony in the Greek Orthodox Church was never performed. Appellant contends that she was ready and willing to proceed with such ceremony, but that John Fitsos became indifferent, refused to set a day certain to marry, made no effort to provide living quarters for her and did not even visit her at the home of her brother. The testimony of Fitsos is that appellant demanded a $5,000 checking account, an automobile and a five-family apartment house as conditions precedent to the religious ceremony.

Fitsos filed a suit for annulment of the marriage in Los Angeles, California, on May 18, 1950 [Ex. 3, Tr. 210]. Appellant established a domicile in the State of Nevada and filed a complaint for divorce [Ex. 9, Tr. 219]. Fitsos appeared in the Nevada action by counsel. Appellant was granted a decree of divorce on September 8, 1950, the court finding, among other things, that her allegation of the existence of the husband and wife relationship was true [Ex. 10, Tr. 223]. The annulment suit was thereafter dismissed by Fitsos on September 14, 1950 [Tr. 218].

A warrant for the arrest of appellant was issued by the Immigration and Naturalization Service on November 15, 1950, and served upon her on November 27, 1950 [Tr. 182, 183]. After a hearing before the administrative officials, appellant was ordered deported on the following charge:

> "The Act of May 14, 1937, in that, at the time of entry, she was not entitled to admission on the nonquota visa which she presented upon arrival for the reason that such visa was obtained through fraud, in that she contracted a marriage to procure entry to the United States as an immigrant and failed or refused, after entry, to fulfill her promises for such marital agreement."

Appellant's appeal to the Board of Immigration Appeals was dismissed on July 9, 1953 [Tr. 54], and a warrant for her deportation was issued on July 31, 1953 [Tr. 49].

Appellant has remained continuously in the United States since her arrival on April 13, 1950, and she resides at the home of her brother in Los Angeles, California.

The questions involved in this appeal are (1) whether the statute under which appellant has been ordered deported is a nullity because of ambiguity, indefiniteness and vagueness; (2) whether there is any reasonable, substantial and probative evidence supporting the charge in the warrant of deportation and (3) whether the deportation hearing was unfair by virtue of the receipt in evidence, over objection, of a communication from the Department of State purporting to show that appellant had knowledge of her status under the Greek quota.

Specifications of Error.

1. The District Court erred in concluding that the terms of the statute under which the appellant has been found deportable and ordered deported are constitutional on their face and as applied to the appellant.

2. The District Court erred in finding as a fact and concluding that there is reasonable, substantial and probative evidence to support the warrant of deportation.

3. The District Court erred in finding as a fact and concluding that the administrative hearing of the Immigration and Naturalization Service was fair.

The government placed in evidence as Exhibit 14 [Tr. 287] certain communications of the Department of State purporting to show that appellant had knowledge that a long wait would ensue before her name was reached for a Greek quota number. Counsel objected to the evidence on the ground that it was incompetent and hearsay [Tr. 134].

ARGUMENT.

I.

The Portion of the Deportation Statute Under Which Appellant Has Been Ordered Deported Is a Nullity Because of Vagueness and Uncertainty.

Appellant's deportation is sought under Section 3 of the Act of May 14, 1937 (8 U. S. C. A. 213a), specifically the last paragraph thereof. The entire section reads as follows:

> *"Deportation of alien securing visa through fraudulent marriage.*
>
> "Any alien who at any time after entering the United States is found to have secured either nonquota or preference-quota visa through fraud, by contracting a marriage which, subsequent to entry into the United States, has been judicially annulled retroactively to date of marriage, shall be taken into custody and deported pursuant to the provisions of section 214 of this title on the ground that at time of entry he was not entitled to admission on the visa presented upon arrival in the United States. This section shall be effective whether entry was made before or after May 14, 1937.
>
> "When it appears that the immigrant fails or refuses to fulfill his promises for a marital agreement made to procure his entry as an immigrant he then becomes immediately subject to deportation. May 14, 1937, c. 182 sec. 3, 50 Stat. 165."

Appellant urges that the language of the last paragraph of Section 3 poses several questions involving clarity. Specifically, what did the legislators mean by the phrase "promise for a marital agreement" as distinguished from the actual marriage itself? What is the nature of the

"promises"? What is the significance in the use of the masculine gender in the last paragraph?

Section 3 of the Act of May 14, 1937 (8 U. S. C. A. 213a) is no longer operative as it was expressly repealed by Section 403(a)(36) of the Immigration and Nationality Act of 1952 (66 Stat. 279).

The last paragraph of Section 3, of the Act of May 14, 1937, was not interpreted by any court during the 15½ years of its existence. In the original draft of the said Act (H. R. 28, 75th Cong., 1st Sess.), Section 3 contained the first paragraph only. The provision constituting the last paragraph was added by way of amendment from the floor of the House during the course of the debate (Cong. Record, 75th Cong., 1st Sess., Vol. 81, Part 2, pp. 2347-2351). Neither the House Report (No. 65. 75th Congress), nor the Senate Report (No. 426, 75th Congress) mentions the paragraph here involved.

There is an official executive interpretation of the last paragraph to Section 3. It was made by the Solicitor of Labor on May 22, 1940, for the Immigration and Naturalization Service, and this memorandum is being printed in full in the Appendix to this brief. The document points up the difficulty experienced by the government in visualizing the kind of case embraced within the scope of the paragraph.

It is well settled that a statute must be intelligently expressed and reasonably definite and certain, and that if it is too vague to be intelligible, it is a nullity. The "void for vagueness" doctrine may be used to test a deportation statute in view of the grave nature of deportation, *Jordan v. De George,* 341 U. S. 223, 71 S. Ct. 703, 95

L. Ed. 886, reh. den., 341 U. S. 956, 71 S. Ct. 1011, 95 L. Ed. 1377. It was said in that case at page 231:

> "The Court has stated that 'deportation is a drastic measure and at times the equivalent of banishment or exile * * *. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. Fong Haw Tan v. Phelan, *supra*." (333 U. S. 6, 68 S. Ct. 374, 92 L. Ed. 433.)

The *Jordan* case also asserts (pp. 231, 232) that the test of indefiniteness is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.

In construing a statute, resorting to extrinsic facts is permitted where the language is ambiguous and the meaning of statutory language must be resolved against the background of the history and circumstances impelling the legislation as well as what may be gleaned from Congressional proceedings, *Matson Navigation Co. v. War Damage Corp.* (D. C. Cal.), 74 Fed. Supp. 705, affirmed, 172 F. 2d 942, cert. den., 337 U. S. 939, 69 S. Ct. 1515, 93 L. Ed. 1744. See also, *Harrison v. Northern Trust Co.*, 317 U. S. 476, 63 S. Ct. 361, 87 L. Ed. 407, wherein Mr. Justice Murphy said:

> "* * * words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination.'" (Citing cases.)

Congressman Jenkins was quite verbose in the course of the House debate upon the imperfection of his amend-

ment (Cong. Record, 75th Cong., 1st Sess., Vol. 81, Part 2):

> (P. 2349) "Mr. Jenkins of Ohio. My purpose in offering this amendment is to put the amendment in the bill where the language is not perfect at all, so it will be a flag to the Senate when this bill gets over there which will give them to understand the purpose of the House is to clean this thing up. We want these people to understand that this is an important matter, and if they practice fraud they should not profit by it."
>
> (P. 2350) "Mr. Jenkins of Ohio. Mr. Speaker, I think we have gone into this matter far enough. I am not saying this amendment is etymologically perfect, but it is the best I can do at this time. We must not waste time. If there are any corrections to be made on it, they can be made in the Senate."
>
> (P. 2350) "* * * Let us allow the amendment to go through, and, if we find that the language is inconsistent, when it gets over to the Senate we can correct it."

The evidence fails to disclose any promises made by the appellant to Fitsos for the marital agreement. They exchanged mutual promises to marry and they did marry in good faith. The "promises," so says the statute, are only those *for* the marital agreement. Compliance with these "promises" would be fulfilled upon the creation of the valid marriage, in this case at Nessau, Bahamas, on March 27, 1950. This marriage continued to be valid until dissolved by the Nevada court on September 8, 1950, when appellant was awarded a divorce decree upon the ground of cruelty.

The ambiguity of the phrase "promises for the marital agreement" was apparent to the present lawmakers when enacting Section 241(c) of the new Immigration and Nationality Act effective December 24, 1952 (8 U. S. C. 1251(c)), a provision analogous to Section 3 of the Act of May 14, 1937. The pertinent portion of the new statute reads:

> "(c) An alien shall be deported * * * if * * * (2) it appears to the satisfaction of the Attorney General that he or she has failed or refused to fulfill his or her marital agreement which in the opinion of the Attorney General was hereafter made for the purpose of procuring his or her entry as an immigrant."

All reference to any "promises" has now been eliminated, and what is condemned is a failure or refusal to fulfill the marital agreement itself.

The phrase "promises for the marital agreement" is much too vague and uncertain to give notice of the conduct proscribed. Although the statute here is not a criminal one, the penalty of deportation is even more stringent and hence, the statutory language should be strictly construed.

Appellant urges also that Section 3 of the Act of May 14, 1937, was directed against male immigrants only. The Senate did not debate the bill at all. The House debate, which is relatively short (Cong. Record, 75th Cong., Vol. 81, Part 2) concerns itself, as does the author of the amendment (Representative Jenkins of Ohio) with

the male immigrant who conspires with a citizen female to deceive the government officials by a bogus marriage arrangement. Excerpts from the debate follow:

At page 2348:

"Mr. Jenkins of Ohio: I know that can be done, of course; but suppose this arrangement is made between these two people with criminal intent in the minds of both; in other words, this man simply buys his way into this country by inducing this woman to enter into this contract, what right have the people of this country, what right have the immigration officials when this man has come to this country and not carried out his arrangement, has not lived with this woman, is not her lawful husband, and takes no responsibility of a husband? What is our right under this bill?

"Mr. Dickstein: There are other provisions of the 1917 law and the 1924 law to take care of people who actually commit a fraud upon the Government by signing a petition, because they are guilty of fraud in that instance.

"Mr. Jenkins of Ohio: That is what I am coming to.

"Mr. Dickstein: That has nothing to do with this bill.

"Mr. Jenkins of Ohio: There ought to be some provision in that record. It looks to me like the gentleman is simply playing into the hands of these people because the most trouble we have from what is trying to be cured here comes from men on the other side who buy their way into this country. They induce some woman to go through with this bogus marriage arrangement and never intend to carry it out. She is paid for it, and a woman could bring a man

into this country this month, another man next month, and so on, and could enter into the business of bringing men in. Under this bill she alone must raise the question. If she does not raise the question, we cannot do anything about it."

At page 2349:

"Mr. Jenkins of Ohio: Mr. Speaker, I want to develop the thought a little further. I think we can supply an amendment which will not hurt this bill but, on the contrary, will strengthen it a lot. We will find the place in this bill and insert one single amendment. I am not trying to delay the bill, I do not want to be put in the position of being against the bill, and I do not want to oppose it, but I think while we are at it we ought to put some teeth in these things. The women in these cases may not be to blame. Every time we have amended the law in this respect we have provided that a man may bring his wife in, but that the woman could not bring the husband in. Why? Because, in fact, we have said that the woman is the weaker of the two and is more susceptible to blandishments at the hands of men. It is thought that it would be pretty hard for a woman to induce a man to marry her for the purpose of assisting her to enter unlawfully, but it is easy for a man with a little money to come to this country on a visit, or acting through an emissary in this country to say to a woman: 'You go through this performance with me. It will all be perfunctory. Here is your thousand dollars and when I get there everything will be all right. I have paid you off.'

"My amendment should provide, when she comes to that place that she finds he is not going to go ahead with the marriage, and the immigration officials find both of them have conspired and that the marriage

has never been carried out, with the result that the immigration officials have been defrauded, they should have a right to put that man in the deportable class and send him out of the country."

The amendment proposed by Representative Jenkins included masculine pronouns, *i.e.*, "*his* promises for a marital agreement made to procure *his* entry as an immigrant *he* then becomes immediately subject to deportation." Turning again to the Immigration and Nationality Act of 1952 (8 U. S. C. A. 1251(c)), we see recognition by the lawmakers of the deficiency in gender appearing in Section 3 of the Act of May 14, 1937. The new section utilizes the words *"he or she"* and *"his or her."* These changes are rendered more striking by the fact that, of all the numerous classes of deportable and excludable aliens, Section 1251(c) is the only one employing the terms "he or she" and "his or her."

The court below states that the 1937 Act is to be interpreted according to the provisions of Title 1, U. S. C., Sec. 1, then in effect which stated: "Words imparting the masculine gender *may* be applied to females." When it appears, however, that the intent of the legislators was to curtail the acts of the masculine sex, it would not be unreasonable to restrict the language to that particular gender.

II.

There Is No Reasonable, Substantial and Probative Evidence Supporting the Deportation Charge Against Appellant.

The courts have long required that an order of deportation be supported by some substantial and probative evidence, *Schoeps v. Carmichael* (C. A. 9, 1949), 177 F. 2d 391, cert. den., 70 S. Ct. 576, 399 U. S. 914, 94 L. Ed. 1340; *Del Castillo v. Carr* (C. A. 9, 1938), 100 F. 2d 338.

Congress recognized this precept when enacting the Immigration and Nationality Act of 1952, for in Section 242(b) (8 U. S. C. A. 1252(b)) thereof it provided that no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence. Adverting for a moment to the memorandum of the Solicitor of Labor (see Appendix), we find the following language:

> "It is believed, therefore, that the following construction of the second paragraph of Section 3 is reasonably warranted: When the marriage of a citizen to an alien results in the alien spouse being admitted to the United States under a nonquota or preference-quota status, the alien's failure to continue to maintain and keep the marital status intact for some reason that is traceable back to the inception of the marriage and establishes the marriage to have been fraudulent from its very beginning, the alien spouse may be made the subject of deportation proceedings. Provided, of course, that the purpose for which the fraud was perpetrated was *'solely to fraudulently expedite admission to the United States.'* The language just quoted and italicized appears in its entirety in the title of the Act

> of 1937. While the usual rule of construction is, that the title of an act forms no part of the act itself, such title may, nevertheless, be resorted to for an explanation of the meaning of the text or language of the act proper. So using the title in this instance, the words 'through fraud, by contracting marriage' in Section 3 mean fraud perpetrated *solely to expedite admission to the United States.* That is a reasonable and logical limitation of the effect of the law in view of the fact that the primary purpose of the legislation is to prevent the abuse or misuse of certain provisions in the immigration laws of this country, and was not sponsored with a view to defending or protecting the integrity of the institution of marriage."

It seems clear, therefore, that to support the deportation charge against the appellant, the government must establish by reasonable, substantial and probative evidence that appellant's marriage was fraudulent from the beginning and that the purpose of the fraud was solely to fraudulently expedite admission to the United States. If appellant's marriage was based upon the usual considerations of love and affection and a desire to achieve the state of matrimony, or if it was not accomplished solely to fraudulently expedite admission to the United States, then the case of the government must fail.

The government is disposed to the belief that its principal witness, John Fitsos, was an innocent dupe to the marriage and that the alleged fraud was solely on the part of the appellant. If any fraud were perpetrated upon the government for the sole purpose of expeditiously securing the entry of appellant to the United States, John Fitsos would certainly be a partner of equal

guilt for it was he who filed a formal petition, under oath, for a nonquota immigrant visa for his "wife" at a time when the marriage had not been consummated. The factors which dispel the theory of fraud traceable back to the inception of the marriage are these:

1. Mr. Fitsos specifically authorized the appellant's brother, Theodore Giannoulias, to present his photograph and name to the appellant in Greece as a possible future suitor and husband. This authorization was given before she even knew of John Fitsos.
2. Mr. Fitsos and appellant exchanged correspondence for several months before she embarked for Nassau, Bahamas, for the marriage ceremony.

Appellant testified:

"Q. Between that time and the time you entered into the marriage with John Fitsos, did you correspond with him? A. Yes, we did correspond." [Tr. 113.]

"Q. Can you state approximately how many letters you received from him between the time your brothers mentioned this agreement and the time you left Greece to enter into the marriage? A. I received less than ten letters. I started corresponding with him after my brother came back here and he concluded the marriage transaction. In the meantime I was corresponding with my brother.

Q. And how many letters did you write to John Fitsos approximately during that period of time? A. I don't remember very well; about six or seven." [Tr. 114.]

"Q. When did you first hear of John Fitsos? A. 1949 when my brother came to Greece.

Q. And did you first hear of John Fitsos from your brother? A. Yes.

Q. After that did you receive any letters from John Fitsos? A. I received letters from him after my brother came to the United States in 1950.

Q. And did you write to him in response to letters he sent you? A. Yes." [Tr. 142-143.]

"Q. Over what period of time did your correspondence continue? A. One month.

Q. And about how many letters did he write you and how many did you write him? A. I don't remember exactly, about four or five letters." [Tr. 143.]

Mr. Fitsos testified:

"Q. Did you ever correspond with your wife? A. I wrote about three letters, and she answered. She never asked me then, what she asked face to face in Los Angeles.

Q. In your letters, did you agree to marry her? A. Yes." [Tr. 230.]

"Q. Had you received any letters from her? A. Three letters.

Q. Did you receive these letters after you had received her photograph from Ted Giannoulias? A. Yes, sir.

Q. Who wrote the first letter, you or her? A. I did.

Q. And she answered your letter? A. Yes, sir.

Q. What time of the year was that? A. That was the beginning of 1950 after her brother came back. He came back 8th of January, 1950, and he told me, 'Well, we can do nothing from Canada,' and then he gave me $300 to help me on the expenses." [Tr. 245-246.]

"Q. Then they arranged to bring your first wife to Nassau? A. That's right, and until she came over she answered about three or four letters to me of my mail." [Tr. 246.]

3. Fitsos agreed to marry the appellant before she undertook the journey to Nassau, Bahamas [Tr. 230].

4. Fitsos made the arrangements for appellant to journey to Nassau, Bahamas [Tr. 246].

Appellant is a religious girl of the Greek Orthodox faith. A civil ceremony alone is not recognized by the church, and it was only natural that she wished a church marriage in Los Angeles before her brother and relatives of the groom. Fitsos was agreeable to the arrangement to have a religious ceremony performed in Los Angeles, and he consented to "respect" the appellant until after the church marriage [Tr. 239, 250, 252]. He had been rebuffed by appellant in a premarital amorous attempt [Tr. 139], but his kisses were not rejected [Tr. 228, 252]. He remained with appellant in Nassau during the time required to secure the approval of the petition for the immigration visa and the actual issuance of that document. He accompanied her from Nassau to the United States where she was landed permanently at Miami, Florida as his wife. He left her immediately upon arrival in order to make a trip to Malone, New York, and she made her way alone to Los Angeles, California. This separation was not of her election or choosing.

While it is true that there is irreconcilable conflict in the testimony concerning the reason for the failure to have the religious ceremony performed after the arrival of

Fitsos in Los Angeles, California about April 27, 1950—and each party has supported corroboration from their respective family members—yet the lack of a church ceremony does not affect the validity of the marriage and does not *per se* demonstrate substantially and reasonably that appellant schemed and contrived from the very beginning to contract a fraudulent marriage solely to expedite her admission to the United States. She states at page 118 of the Transcript:

> "Q. Did you enter into this marital agreement for the purpose of facilitating your admission into the United States? A. No, I married him because I liked him as a husband and with the aim of getting married.
>
> Q. At the time you married John Fitsos in Nassau, Bahamas, was it your intention to live with him as man and wife following the marriage. A. Yes, yes, yes.
>
> Q. Why did you not live with John Fitsos as man and wife following your marriage on March 27, 1950? A. Because this was against our religious beliefs and I have been waiting to get married in the Greek Orthodox Church."

Coition, of course, is not necessary to create a valid marriage, *Martin v. Otis,* 233 Mass. 491, 124 N. E. 294; *Franklin v. Franklin,* 154 Mass. 515, 28 N. E. 681; *Mitchell v. Mitchell,* 136 Me. 406, 11 A. 2d 898; *Brooks-Bischoffberger v. Bischoffberger,* 129 Me. 52, 148 Atl. 606. Would one act of sexual intercourse or several acts have cured the defect alleged by the government to exist in the marriage of the appellant? If appellant had the cunning and acumen that the government attributes to her, namely, the planning and execution of a fraudulent

marriage from the very beginning, it seems likely that foresight would have impelled her to submit to Fitsos at least once.

Appellee, it appears, is conceding the validity of the marriage performed on March 27, 1950 at Nassau, Bahamas. Only the alleged failure or refusal to fulfill the promises for the marriage agreement is attacked. The lower court opines also that the validity or invalidity of the marriage is of no consequence. Nevertheless, it follows that the existence of a valid marriage would encompass all of the elements and incidents of that relationship. The marriage contract was complete when entered into and existed until a divorce decree was granted on September 8, 1950. The warrant of arrest in deportation proceedings was not issued until November 15, 1950 [Tr. 183], more than two months after the dissolution of the marriage. It is inconsistent, therefore, to hold, on the one hand, that a valid marriage was created on March 27, 1950 which existed until September 9, 1950, yet issue a formal accusation in November, 1950 that appellant "fails and refuses" to fulfill her promises for a marital agreement.

Representative Jenkins, the author of the last paragraph to Section 3 stated in the Congressional Record of March 17, 1937, at page 2350:

> "* * * This is what my amendment does. It simply provides that whenever any alien is permitted to enter this country upon certain representations as to his present or intended marital relationships, and later it is discovered that he has made misrepresentations, he is then subject to deportation. Why should he not be deported? To whom does he make such misrepresentations? He makes them to

> the American officials in a foreign country. He deceives our own immigration officials there and as soon as they find he has deceived them or has practiced deceit, why should they not have the authority to say to him, 'You have deceived us, you have lied to us, and now you are in the deportable class and we are going to send you back.' *What is the use of waiting for a court decree?* As soon as they find out he has misrepresented basic and cardinal facts in the statement which he has to file, what is the use of temporizing with him? * * *" (Emphasis added.)

It is plain that Mr. Jenkins and the Congress in passing his amendment intended that the last paragraph of Section 3 operate in cases where an adjudication of a competent court had not been made. In appellant's case, the existence of the marital status and her right to a divorce on the ground of cruelty had been properly and completely determined by the Nevada court on September 8, 1950, more than two months prior to the service upon her on November 27, 1950 of a warrant of arrest in deportation proceedings. After the intervention of the court, by a valid decree, it could not longer be charged that appellant "fails or refuses" to carry out promises for a marital agreement. This premise gains support from the use of the words "immediately deportable" in the last paragraph to Section 3. Congressman Jenkins wanted the man expelled immediately and before the court had passed upon the marriage relationship, but this is not the case at bar.

The foreword to both House Report No. 65 and Senate Report No. 426 accompanying H. R. Bill No. 28, enacted as Section 3 of the Act of May 14, 1937, contains a

statement by Mrs. O'Day from the Committee on Immigration and Naturalization as follows:

> "This bill does not bring within its purview cases in which divorce, separation, abandonment is the action by which such marriages between aliens and citizens are terminated. Only the judicial annulment of such marriages by an American court, retroactive to the date on which such marriages were contracted, justifies deportation of the alien spouse under the provisions of this bill."

In other words, the issue of whether any fraud had been perpetrated in undertaking the marriage was wisely left to the judgment of a court, and only an annulment satisfies the statute.

The Solicitor of Labor made it very clear in his memorandum (see Appendix) that the last paragraph to Section 3 does not apply where a divorce is granted. He said:

> "While it is obvious that the language of the second paragraph of Section 3 is not very clear, it certainly contains nothing, nor does the debate, indicating that it was the intention to deprive either of the parties to the marriage of the right of obtaining a *divorce.* The word *'divorce'* is used nowhere in the debate. The function of *divorce* is so well known throughout the United States that it is only reasonable to assume that the term itself would have been expressly used had the amendment been intended to, in effect, prohibit the dissolution of the marriage in that way. At the time the legislation was enacted, Congressman Jenkins had been a member of the Bar for thirty years, and had been prosecuting attorney for two terms in Lawrence County, Ohio. Therefore, if it had been his intention to enlarge the scope of the

law by making it applicable to a dissolution of a marriage by divorce, he undoubtedly would have said so. His failure to do so must be interpreted as indicating a lack of such intention on his part, or of the legislature as a whole."

Fitsos, it will be noted, remarried in Greece in March, 1951 [Tr. 264]. He married a girl from the home town (Kamari, Greece) of his brother-in-law, George Smerlis. It will be recalled that Fitsos left his bride at Miami, Florida, for the purpose of seeing his brother-in-law shortly before the latter embarked for Greece. It is not inconceivable that Fitsos was disappointed in the appellant as a "picture" bride and believed that she would be a younger looking woman; that he went through the marriage ceremony in Nassau, Bahamas only because of the commitments already made to appellant; that he began with Smerlis a search for his second bride even before his first marriage was dissolved; that he was, as appellant charges, cold and indifferent when he arrived in Los Angeles, would not set a date for the religious ceremony, and was quite agreeable to the divorce which resulted in a prompt release from the matrimonial state. The accusation of John Fitsos that the religious ceremony was prevented by the appellant's pecuniary demands for a $5,000 checking account, an automobile, and a five-family apartment house, is highlighted and debilitated by his testimony of January 12, 1951 [Tr. 237], that appellant was preparing to marry another person and was now demanding a $10,000 checking account, a Cadillac automobile, and an apartment house for ten families. It is remarkable that the appellant, a girl from the Greek countryside, should develop in a short time such consistent mercenary attributes.

It was said in *United States ex rel. Lindenau, et al. v. Watkins,* (D. C. N. Y., 1947), 73 Fed. Supp. 216 (reversed on other grounds, 164 F. 2d 457), at page 221:

> "Substantial evidence is evidence of such validity and weight as would be sufficient to justify a reasonable man in drawing the inference of fact which is sought to be sustained. It implies a quality of proof which induces conviction and which makes a definite impression on reason. It must be more than a scintilla of evidence, and more than suspicion or surmise. It must be more satisfying than hearsay or rumor. Mere rags and tatters of evidence are not sufficient. Some courts have gone as far as to say that evidence subject to either one of two inferences is not substantial. The test in determining what constitutes substantial evidence in an administrative proceeding is the same as that applied in trials by jury.
>
> "This doctrine is of the utmost importance. It must be borne in mind that administrative authority is frequently delegated to subordinates who act in the name of the head of the agency to which they are accredited. In this respect the administrative process is vastly different in its essential nature from the judicial process. This circumstance makes it indispensable that the decisions of administrative agencies, which frequently dispose of important personal and property rights, should be subject to the substantial evidence rule. For example, in the present instance, the liberty of a human being and his entire future are at stake. This is generally the case in proceedings under the immigration laws. For these reasons the requirement of substantial evidence should be rigidly enforced in such proceedings."

Appellant urges that there is no substantial, reasonable or probative evidence establishing that she contracted marriage fraudulently for the sole purpose of fraudulently expediting her entry into the United States.

III.

The Deportation Hearing Was Unfair Because of the Receipt in Evidence of Communications From the State Department Without a Disclosure of Other Communications Having a Bearing Upon the Same Issue.

There was received in evidence as Exhibit 14 of the deportation hearing, over objection of counsel [Tr. 134], certain governmental communications, particularly one of the American Embassy, Athens, Greece, dated January 25, 1952, purporting to rebut appellant's statement that about December, 1949 she was promised by the American Consul in Greece that she "was among the first to come to the United States and (her) visa was coming up" [Tr. 117-118]. The exhibit, contends the government, establishes that she would have had an interminable wait to secure a Greek quota visa, and hence that her marriage to Fitsos was solely to fraudulently expedite the issuance of an immigration visa.

Appellant first registered under the Greek quota about 1937 and was assigned No. 285 [Tr. 170]. The Embassy's letter [Ex. 14] admits that she filed a visa application "prior to the war." The said communication further states that in accordance with Department instructions, all "pre-war lists were destroyed," but it does not state when this instruction was given nor whether the appellant was so notified. Neither is there any revelation of how the appellant "re-applied" for registration on September

10, 1947, and was given No. 6483 at that time. The appellant testifies as follows [Tr. 117-118]:

> "Q. At the time you left Greece did you believe that you would be able to enter the United States for permanent residence without entering into a marital agreement with a United States citizen? A. Certainly, yes. I had been waiting for my visa.
>
> Q. Had you been notified that the visa would soon be available to you? A. The American Consul in Greece had promised me that I was among the first to come to the United States and my visa was coming up.
>
> Q. When did he promise you this? A. He has written me about it, the American Consul, and also he verbally told me so in December, 1949."

Appellant's brother, Theodore Giannoulias, asserts [Tr. 170] that he personally appeared before the American Consul in Athens in 1949 relative to his sister's visa case and that the officials were indefinite and stated: "We don't know what is going to happen from day to day, what orders we are going to receive from Washington." A person who had waited some 13 years to enter the United States, as did the appellant, might be entitled to some belief that her name would be reached in the reasonably near future after so long a time had elapsed.

The Board of Immigration Appeals in its decision of July 9, 1953 [Tr. 18] utilized Exhibit 14 to contradict appellant's statement that she believed a quota visa would be forthcoming to her soon. Accordingly, it was an act of unfairness for the government not to present for inspection and examination the complete file of the American Consul at Athens, Greece relating to the appellant so that the scope of the "re-registration" in 1947 could

be ascertained and other communications or notes bearing upon the question of knowledge of the appellant of her position on the quota waiting list could be uncovered.

The error of an administrative tribunal may be so flagrant as to convince a court that the hearing accorded an alien was not a fair one., *Kwock Jan Fat v. White,* 253 U. S. 454, 457, 40 S. Ct. 566, 64 L. Ed. 1010; *Bridges v. Wixon* (C. A. 9, 1944), 144 F. 2d 927, 931.

Conclusion.

Appellant urges that neither the law nor the evidence supports the order for her deportation. Her long and cherished wish of living in the United States should not be extinguished without reasonable, substantial and probative evidence.

Wherefore, appellant prays that the judgment of the lower court be reversed and that she be discharged from the custody of the Immigration and Naturalization Service.

Respectfully submitted,

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By Marshall E. Kidder,
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APPENDIX.

55804/996 May 22, 1940

Memorandum for the Immigration and Naturalization Service.

In Re: Interpretation of the last paragraph of Sec. 3 of the Act of May 14, 1937 (50 Stat. 164; U. S. C., ti. 8, sec. 213a) entitled an Act to authorize the deportation of aliens who secured preference-quota or non-quota visas through fraud by contracting marriage solely to fraudulently expedite admission to the United States, and for other purposes.

The Central Office requested an opinion interpreting the second paragraph of Sec. 3 of the said Act of May 14, 1937. That section reads, in its entirety, as follows:

"SEC. 3. That any alien who at any time after entering the United States is found to have secured either non-quota or preference-quota visa through fraud, by contracting a marriage which, subsequent to entry into the United States, has been judicially annulled retroactively to date of marriage, shall be taken into custody and deported pursuant to the provisions of section 14 of the Immigration Act of 1924 on the ground that at time of entry he was not entitled to admission on the visa presented upon arrival in the United States. This section shall be effective whether entry was made before or after the enactment of this Act.

"When it appears that the immigrant fails or refuses to fulfill his promises for a marital agree-

ment made to procure his entry as an immigrant he then becomes immediately subject to deportation."

The Act had its origin in bill H.R. 28, in the 1st Session of the 75th Congress. As originally drafted and unanimously approved by the House Committee on Immigration and Naturalization, also as approved by this Department, Sec. 3 consisted of the first paragraph only, as it was eventually enacted into law. When the bill was debated in the House of Representatives, the provision now constituting the second paragraph of Sec. 3 was added as an amendment. Neither House Report (No. 65, 75th Cong.) nor Senate Report (No. 26, 75th Cong.) contains any reference to, or discussion of, that paragraph. As the addendum was made in the course of the debate in the House, the only source of information available that throws any light on its meaning is what was said in the debate as set forth in the Congressional Record (Vol. 81, Pt. 2, p. 2347, *et seq.*).

Prior to considering what transpired in that debate, it might be well to consider the antecedent history leading up to the enactment of the law, as revealed by files of this office, so as to make clear just what were the prevailing evils it was desired to have the new legislation remedy and cure, and the object and purpose it was intended to have it accomplish. The most important case seems to have been that of Mary Toutoundjy or Shashaty (file 55644/630; Solicitor's file 4-2314). Born in Syria about the year 1910, she went to Cuba in the year 1925 with her aunt. On December 23, 1925, she was married in Havana by a civil ceremony to Joseph A. Shashaty, a citizen of the United States and a resident of Paterson, New Jersey, who about three weeks previously had met

ıer for the first time in Havana. Shortly after the mar-riage, he made application to this Department through the American Consul General at Havana for a non-quota immigrant status for his wife under the provi-sions of Section 4(a) of the Immigration Act of 1924 (Act of May 26, 1924; 43 stat. 155; U. S. C., ti. 8, sec. 155) which confer that status upon the alien wife of a citizen of the United States. Because of business de-mands the husband returned to the United States with-out his wife. On the basis of the non-quota immigration visa issued to her, the wife was admitted to the United States at Key West, Florida, February 4, 1926. She stated at the time of that entry that she was destined to her husband, Joseph A. Shashaty, of Paterson, New Jersey.

They never lived together as man and wife at any time. Therefore, the marriage was never consummated. Each gave varying reasons for that situation, the hus-band claiming that it was because of unwillingness on her part, stating she had said she would not live with him until a religious ceremony was performed, and never would go through such a ceremony with him, either in Cuba or the United States. She, of course, made accusa-tions against him which it seems unnecessary to discuss. It is sufficient to say that the husband brought a pro-ceeding in the Chancery Court in the State of New Jersey and obtained a decree annulling the marriage on the ground that it was brought about through fraud per-petrated by the wife, in that in entering into the marriage she had no matrimonial intent, but simply used the cere-mony to facilitate her entry into the United States under the immigration laws.

word "and". Congressman Jenkins himself admitted that the language of the amendment was not perfect. He had hopes, however, that the Senate might supply the necessary clarification, saying: "Let us allow the amendment to go through, and, if we find that the language is inconsistent (evidently, with the preceding portion of Section 3) when it gets over to the Senate we can correct it." The Senate, however, does not seem to have considered the amendment. At least it is not discussed in Senate Report No. 426, nor is it mentioned in the debate of the Senate, as that body passed H. R. 28, together with several other bills dealing with the subject of immigration at the same time without any debate or discussion on the floor of the Senate (*Ibid.,* Pt. 4, p. 4089).

While the general rule of statutory construction is, that statements made in debates in Congress may not be used to explain the meaning of the language of a statute, an exception thereto applies where the language of an act of Congress is not clear and enlightenment is sought from the explanations given on the floor of the Senate or House by members thereof in charge of the measure (Wright v. Mountain Trust Bank, 300 U. S. 440, 57 S. Ct. 556). While Congressman Jenkins was not in charge of H.R. 28, it was he who proposed the amendment and, naturally, his own statements ought to be considered in determining the purpose and object the amendment was intended to serve. All of his statements are not quoted herein, as it is believed the one now about to be quoted sufficiently reflects his views. After Chairman Dickstein, of the Immigration and Naturalization Committee, had explained that, under the bill as it then stood, after a court had decreed that the marriage of an alien

to a citizen was obtained, or entered into by fraud, solely to enable the alien to enter the United States under exemptions from the usual legal requirements, the Department of Labor would then have the right to deport the alien who perpetrated such fraud, Congressman Jenkins made the following reply (*Ibid,* Pt. 2, p. 2348):

> "I know that can be done, of course; but suppose this arrangement is made between these two people with criminal intent in the minds of both; in other words, this man simply buys his way into this country by inducing this woman to enter into this contract, what right have the people of this country, what right have the immigration officials when this man has come to this country and not carried out his arrangement, has not lived with this woman, is not her lawful husband, and takes no responsibility of a husband? What is our right under this bill?"

The foregoing and other statements in the debate indicate that the amendment was aimed at cases in which a marriage took place abroad between an alien and a citizen; that, as the result thereof, the alien spouse gained admission to the United States, either as a nonquota or preference-quota immigrant, and, after entering the United States, refused or failed to *continue to* maintain and keep up the marital relation with his or her citizen spouse for some reason that indicates there was a lack of a bona fide matrimonial intent at the inception of the marriage; that the marriage was entered into solely for the purpose of enabling the alien to enter the United States, and the purported marriage has not been annulled by a judicial decree. In other words, Congressman Jenkins wanted a provision in the statute which would authorize the deportation af aliens in certain cases without the necessity

of having entered a judicial decree of annulment retroactive to the date of the marriage. His other statements in the debate and those of other persons who participated therein seem to reflect the same intention.

It is believed, therefore, that the following construction of the second paragraph of Section 3 is reasonably warranted: When the marriage of a citizen to an alien results in the alien spouse being admitted to the United States under a nonquota or preference-quota status, the alien's failure to continue to maintain and keep the marital status intact for some reason that is traceable back to the inception of the marriage and establishes the marriage to have been fraudulent from its very beginning, the alien spouse may be made the subject of deportation proceedings. Provided, of course, that the purpose for which the fraud was perpetrated was *"solely to fraudulently expedite admission to the United States."* The language just quoted and italicized appears in its entirety in the title of the Act of 1937. While the usual rule of construction is, that the title of an act forms no part of the act itself, such title may, nevertheless, be resorted to for an explanation of the meaning of the text or language of the act proper. So using the title in this instance, the words "through fraud, by contracting marriage" in Section 3 mean fraud perpetrated *solely to expedite admission to the United States*. That is a reasonable and logical limitation of the effect of the law in view of the fact that the primary purpose of the legislation is to prevent the abuse or misuse of certain provisions in the immigration laws of this country, and was not sponsored with a view to defending or protecting the integrity of the institution of marriage.

Nice questions arise as to what is necessary to bring an alien within the language "fails or refuses to fulfill his promises." Supposing, for instance, the citizen spouse obtains a divorce from the alien husband for something that originated or occurred after entry into the United States, but in no way indicates that the marriage was fraudulently entered into solely to enable the alien spouse to enter the United States. Or, suppose the alien spouse obtains a divorce under the circumstances just stated. In neither instance would the fact of dissolution of the marriage by *divorce* render the alien spouse subject to deportation." While it is obvious that the language of the second paragraph of Section 3 is not very clear, it certainly contains nothing, nor does the debate, indicating that it was the intention to deprive either of the parties to the marriage of the right of obtaining a *divorce*. The word *"divorce"* is used nowhere in the debate. The function of *divorce* is so well known throughout the United States that it is only reasonable to assume that the term itself would have been expressly used had the amendment been intended to, in effect, prohibit the dissolution of the marriage in that way. At the time the legislation was enacted, Congressman Jenkins had been a member of the Bar for thirty years, and had been prosecuting attorney for two terms in Lawrence County, Ohio. Therefore, if it had been his intention to enlarge the scope of the law by making it applicable to a dissolution of a marriage by divorce, he undoubtedly would have said so. His failure to do so must be interpreted as indicating a lack of such intention on his part, or of the legislature as a whole.

It seems rather difficult to visualize the kind of cases at which the amendment was directed. Its sponsor appears

to have had in mind the case of a woman citizen marrying an alien husband, and after his entry into the United States he would abandon the marital relation, but notwithstanding such abandonment, the citizen wife would take no steps to have the marriage annulled. Without the cooperation of the wife, it manifestly will almost be impossible for the immigration authorities to obtain sufficient evidence to develop a case under the statutory provision in question. For that reason the second paragraph of Section 3 may turn out to be a dead letter, incapable of enforcement.

I might, however, refer to an actually adjudicated case to which that paragraph could be held to apply. It was decided by the Court of Errors and Appeals of the State of New Jersey, February 4, 1931. It is entitled Salzberg v. Salzberg, 103 Atl. 605. The facts therein show that Mr. Salzberg was a widower, with three children. The woman in the case—an alien—was already under an order of deportation. (As her maiden name is not stated in the Court's opinion, efforts made to identify the case from the immigration indexes proved unsuccessful.) Through the manipulation of her mother, the alien married Salzberg. Some time thereafter, Mr. and Mrs. Salzberg, accompanied by some other persons, went to Canada, apparently to enable the wife to obtain an immigration visa for use in being lawfully admitted to the United States. After her reentry into this country, she discontinued living with her husband. He brought a suit, seeking a decree of annulment of the marriage. It was granted in the lower court, but reversed by the appellate court for the following reasons stated in its opinion:

> "[1, 2] It seems quite apparent from the evidence that no love could have entered into the mar-

riage. It appears to have been a cold businesslike proposition on the part of the parties. The wife, in order to remain in this country, wished to marry an American citizen, and the husband wished to obtain some one to care for his children. There is a failure of proof of fraud for the reason that the petitioner admits he knew the motive of the wife two days prior to the marriage. The marriage took place and was consummated. There is nothing in the evidence which satisfactorily proves that either of the parties at the time the marriage ceremony was performed were misled by fraudulent statements or misrepresentations of one to the other. In order to determine what will constitute sufficient fraud to annul a marriage, regard must be had for the whole status of both parties and the circumstances which induced the contract. As a matter of fact it seems that each intended to fulfill their part of the agreement at the time the ceremony was performed, although it appears that there was no affection between them before or at the time of marriage. A marriage cannot be annulled for the reason only that no love existed between the parties to the marriage at the time thereof. Such a procedure would be to establish a dangerous precedent and open the door to an easy method of setting aside marriage contracts. We are therefore of the opinion that there was not sufficient fraud shown on the part of the wife which induced the husband to marry her and which would satisfy the court in annulling the marriage.

"The decree of the Court of Chancery is therefore reversed with costs."

As will have been noted, the Court found that the alien woman entered into the marriage "in order to remain in this country." The fact that she was in the United States when the marriage was entered into would not prevent the statute from applying. While there is no express provision in the Act of 1937 dealing with the location or place where the marriage occurs, it is obvious that the protection of the law is just as much needed in connection with marriages performed in the United States, as those performed elsewhere.

GERARD D. REILLY,
Solicitor of Labor.

Attachments
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